IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Chhogalal and another.
vs.
Smt. Dewoo.

S.B.CIVIL SECOND APPEAL NO.7/2004 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 8.10.2003 PASSED BY SHRI N.L. CHAMPAWAT, ADDITIONAL DISTRICT JUDGE NO.2, CHITTORGARH IN CIVIL APPEAL NO.19/1997 (16/1997).

DATE OF JUDGMENT ::: 10.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. NK Rastogi, for the appellants.
Mr. DS Rathore, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

This appeal is against the concurrent findings of courts below in judgment and decree dated 28.5.1997 of the trial court decreeing the plaintiff's suit and dismissal of

first appeal by the first appellate court vide judgment and decree dated 8.10.2003.

Brief facts of the case are that the plaintiff, a widow lady, filed a suit for cancellation of gift deed dated 20.6.1986 which was alleged to have been executed by the plaintiff in favour of defendant no.1 Chogalal, son of defendant no.2 (uncle of plaintiff). Chogalal was minor of the age of 5 to 6 years at the time of gift. The suit has been filed by impleading Chogalal as defendant no.1 through his next friend and natural guardian, his mother, Smt. Sosar. Father of defendant no.1 Chogalal, Onkar was also impleaded as defendant no.2. The plaintiff alleged that the father of the plaintiff and the defendant no.2 had apprehension that the plaintiff (widow) may contract second marriage (nata) and thereby, the property of the plaintiff's husband may go to other family, therefore, they persuaded the plaintiff to execute a will in favour of Chogalal but instead of getting the will executed, a gift deed was got executed by committing fraud upon the plaintiff. It is also pleaded that the gift deed is illegal as it has been got executed for consideration and further the donor never accepted the gift, therefore, also, the gift is illegal and ineffective. It is also submitted that the possession of the land in question was not delivered to the defendant no.1 by the plaintiff.

The defendant no.1 submitted written statement which appears to have been signed by the defendant no.1's mother Smt. Sosar as well as by advocate of the defendant no.2 –

father of the defendant no.1 after filing the power by both father and mother of defendant no.1. It appears that the counsel for the defendant no.1 pleaded no instructions, upon which an application was filed by the plaintiff for appointing court guardian for the defendant no.1. Upon which the trial court on 12.2.1990 ordered that in case, the counsel for defendant no.1 – minor will not appear, then the court guardian will be appointed. On 23.4.1990, appearance was put on behalf of the defendant no.1 and the counsel specifically stated that the mother of the defendant no.1 will contest the suit on behalf of the minor. Upon this, the Court felt that there is no necessity for appointing court guardian.

The trial court concluded the trial in almost 10 years and the defendant no.1 was represented by his natural guardian Smt. Sosar, mother of the defendant no.1 in a suit where father of the defendant no.1 was also party as defendant no.2. The trial court observed that the reason for gift given in the gift deed is that the defendant no.1 is giving good services to the donor plaintiff whereas the defendant no.1 was of the age 5-6 years at that time. The trial court also after appreciation of evidence held that the gift deed was never accepted by the donee apart from the fact that the trial court found that the gift deed was got executed by undue influence and by committed fraud.

The defendant no.1's next friend – Smt. Sosar preferred regular first appeal to challenge the judgment and decree

of the trial court dated 28.5.1997. The defendant no.1's father also joined himself as appellant. The first appellate court dismissed the appeal by judgment and decree dated 8.10.2003. Hence, this second appeal.

Learned counsel for the appellant vehemently submitted that the suit filed by the plaintiff impleading the minor defendant no.1 as party through natural guardian – his mother was incompetent in view of the Order 33 Rule 3 CPC because of the reason that no application appointing court guardian was submitted before the trial court nor the trial court recorded its satisfaction about the fact of minority of defendant no.1 and did not appoint the court guardian. It is also submitted that the defendant no.1's natural guardian was father and not mother and, therefore, the court below committed serious illegality in entertaining and proceeding with the suit and decreeing the suit against the defendant no.1.

It is also submitted that the mother of the defendant no.1 accepted the gift by admitting the gift in the written statement filed by her, therefore, the gift was accepted by donee. It is submitted that the gift can be accepted any time in the lift time of donor and that acceptance was made by the mother of defendant no.1 during lift time of the donor, therefore, there is no defect in the gift. It is also submitted that the trial court put the burden on the defendant to prove that the gift deed was executed by the plaintiff by her free will.

It is also submitted that the gift deed contains the

fact that the possession of the property was delivered to the donee and that gift deed was acted upon and after finding possession of the defendant no.1, the revenue authorities mutated the land in the name of the defendant no.1, therefore, the donee by implication accepted the gift and also took possession of the property, therefore, the finding recorded by the two courts below is erroneous.

I have considered the submissions of learned counsel for the appellant and perused the reasons given by two courts below and so also, perused the record.

The objection raised against framing of the suit not only has legal basis but is absolutely frivolous in as much as the suit can be filed against minor through next friend as provided under Order 32 Rule 1 CPC. In case, the next friend refuses to act for the minor, then the court guardian can be appointed. In this case, the suit was properly instituted. Notices were served, mother of defendant no.1 appeared as next friend of the defendant no.1 and submitted detail written statement. The defendant no.1's natural guardian – father was also party in the suit and filed power and submitted written statement through his advocate and power of father of the defendant no.1 is available in the record of the trial court. Not only this but the defendant no.1's next friend – mother preferred appeal after contesting the suit for 10 years wherein the natural guardian of the defendant no.1 was also appellant. Not only this but in the memo of appeal, the defendant no.1

never pleaded that his case was prejudiced because of negligence of the next friend of the defendant no.1. It will be further relevant to mention here that the defendant no.1 himself after attaining majority submitted power before the first appellate court and he did not allege that his next friend did not contest the suit properly or any prejudice has been caused to him. Despite all these things, objection has been raised in appeal that the suit was not properly framed. This objection is factually and legally wrong. Further, it has been argued that the gift was accepted by the defendant's next friend, mother, that too by accepting the gift in written statement and despite this fact, argument has been raised that the suit has not been properly constituted because the defendant no.1 was impleaded as defendant through his mother who alleged to have accepted the gift.

So far as finding of the trial court as well appellate court about free will of the plaintiff is concerned, that finding of fact is binding and suffers from no error in view of the fact that two courts below considered all the facts and circumstances under which the alleged deed was alleged to have been executed. The basic fact for gift is the services of the defendant no.1 and that fact appears to be on the face of it absolutely wrong because of the reason that the defendant no.1 was of the age of 5-6 years and he could not have served a widow lady. In view of the above, it cannot be said that the courts below have not appreciated the facts rather say that the courts below

considered all evidence and circumstances for recording the finding against the defendant no.1.

I do not find any force in submission of learned counsel for the appellant that simply because there is an endorsement of Sub-Registrar that the plaintiff appeared before him and accepted execution of deed, then no plea can be accepted contradicting the endorsement of presentation of document and its due execution. If such a plea is accepted, then it may result into holding that no suit for cancellation of any registered document on the ground of fraud is maintainable, merely because there is endorsement of Sub-Registrar. Learned counsel for the appellant relied on the judgment delivered in the cases of Syed Walljunddin vs. Mst. Rafiqa Bibi reported in RLW 1986 P.611 wherein, certificate of Sub-Registrar under Section 60 was found to be sufficient proof of due execution of the document. This Court in the said judgment held that there is a certificate of registration as required under Section 60 of the Registration Act and the endorsement made by the Sub-Registrar on Ex.1 goes to prove that its execution was admitted by the executant and, since it being an act performed by the Sub-Registrar in his official capacity, it should be presumed that he would not make such an endorsement unless the execution was admitted before him. On the basis of this endorsement, the Court can presume that the executant admitted the execution of the document before the Sub-Registrar. While citing this judgment, learned counsel for the appellant could not see the next line wherein this Court held that “Undoubtedly, there

cannot be further presumption that the deed had been executed by the executant with the knowledge of its contents". Therefore, it is clear that the execution can be presumed but correctness of the contents cannot be presumed as held by this Court in the aforesaid judgment relied upon by learned counsel for the appellant himself.

In view of the above also, the judgment of the courts below appears to be based on correct legal interpretation of law.

Learned counsel for the appellant also relied upon another judgment of this Court delivered in the case of Dheer Singh vs. Amar Singh and others reported in 1998 DNJ (Raj.) 1 wherein this Court held that the presumption of registered adoption deed is a statutory presumption of adoption. In a case where there is a registered adoption deed, there is a presumption under Section 16 of the Hindu Succession Act. Said proposition has no application to the facts of the case in the light of the above discussion.

In view of the above, I do not find that any substantial question of law arises in this appeal. Accordingly, this appeal having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya